

*R. Arsenoff*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Metters Industries, Inc.--Request for  
Declaration of Entitlement to Costs

**File:** B-240391.5

**Date:** December 12, 1991

John F. DePasse, III for the protester.  
Charles A. Walden, Esq., Drug Enforcement Administration,  
for the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
this decision.

### DIGEST

Protester is not entitled to the costs of filing and pursuing its protest where, in response to a protest which challenged the conduct of discussions and the lack of a common cutoff date for best and final offers, the agency promptly initiated an investigation into the 10-month course of the procurement and, in conjunction with preparation for a lawsuit filed during the investigation by another offeror, discovered potential regulatory and statutory violations which led to the cancellation of the solicitation 2 days after the agency report on the protest was due to be filed.

### DECISION

Metters Industries, Inc. requests that our Office declare it entitled to recover proposal preparation costs and the costs of filing and pursuing its protest in connection with request for proposals (RFP) No. DEA-90-R-1685, which was issued on June 13, 1990, for data entry services by the Drug Enforcement Administration (DEA). The RFP was reserved for socially and economically disadvantaged small business firms pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988).

We deny the claim.

Metters' first protest was filed on April 19, 1991, alleging that DEA had changed its requirements during discussions without issuing a written amendment to the solicitation, that the agency had failed to provide sufficient time to respond to a request for best and final offers (BAFO), and that no common cutoff time for BAFOs had been established among competing offerors. DEA referred the matter to its

[Electronically signed by Robert C. Arsenoff, Esq., Office of the General Counsel, GAO]  
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counsel's office, which conducted an investigation into the protester's allegations as well as other allegations concurrently raised in a lawsuit filed by another offeror involving problems occurring over the 10-month course of the procurement.

The agency acknowledged the legitimacy of two of Metters' contentions involving changed requirements and the lack of a common cutoff time for BAFOs. In addition, DEA reports that, because of a continuing disagreement with the Small Business Administration (SBA) over the appropriate small business size standard, that agency refused to enter into an 8(a) contract under the RFP. DEA also reports, without elaboration, that violations of the procurement integrity provisions contained in 41 U.S.C. § 423 (1988 and Supp. I 1989) may have occurred. As a result of these conclusions, on May 30, DEA canceled the RFP and indicated that it would later recompute its requirements under the 8(a) program. These results were communicated to this Office and to the protester on May 31. In turn, we dismissed Metters' protest on June 4, as academic in light of the action taken by the agency.


On June 14, Metters protested the cancellation of the solicitation and claimed its proposal preparation and protest costs in connection with its initial protest. DEA filed a timely report on July 23 to which Metters never responded. Pursuant to our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(j)), we dismissed this protest on August 9, because Metters failed to file timely comments. In doing so, we stated that we would issue a separate decision concerning the protester's claim for costs incurred in pursuit of its protest.

Where an agency takes corrective action prior to our issuing a decision on the merits of a protest, we may declare a protester entitled to "recover reasonable costs of filing and pursuing the protest." 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)).<sup>1</sup> This regulatory provision is intended to allow the award of costs when agencies unduly delay taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 70 Comp. Gen. \_\_\_, 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, an agency takes prompt corrective action in response to the protest. Id.

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<sup>1</sup>Despite Metters suggestion to the contrary, section 21.6(e) does not confer authority to award proposal preparation costs.

Here, DEA promptly initiated an investigation into Metters' protest allegations. That investigation broadened as the result of a lawsuit filed by another offeror on May 21. The procurement that was investigated had a 10-month history marked by numerous legal challenges, including agency-level protests, protests to this Office and appeals to the SBA. DEA reports that the investigation into possible regulatory and statutory violations is continuing under the aegis of special agents of the Department of Justice. Because of the seriousness of these matters, they were brought to the attention of the Administrator of DEA, who made the decision to cancel the RFP. Under these circumstances, given the time necessarily involved in considering and investigating the allegations raised by the protester and litigants, we do not believe that DEA unduly delayed taking corrective action. Accordingly, we deny Metters' request for a declaration of entitlement to costs. Oklahoma Indian Corp., supra.

  
for James F. Hinchman  
General Counsel